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ABSTRACT

In the United States, the Bill of Rights is most often thought of as the charter that establishes individual rights in categories such as "freedom of expression" and "rights of the accused." In this essay it is argued that this conception of the Bill of Rights, while perhaps acceptable for constitutional law, does not provide an adequate historical interpretation. This paper seeks to examine the eighteenth-century meaning of the Bill of Rights and the particular rights provided within it. The eighteenth-century conception of rights was more community-oriented than the individual-oriented conception of rights today. A term that describes the eighteenth-century conception of the Bill of Rights is "protected self-government." This concept contains two strands: civil liberties and the right to self-government; and the provisions of the Bill of Rights were designed not only to guarantee civil liberties but also to tie those liberties into the political right of self-government. The right to a trial by jury is used as an illustration. In the late eighteenth century the Founders viewed the right of trial by jury as a right belonging not only to the accused but also to the citizen as juror. It also is contended that there are five basic sources of the concept of protected self-government and its particular provisions contained in the U.S. Bill of Rights. These are English law, Puritan and Whig consent theory, American colonial charters of liberties, first American state constitutional bills of rights, and the constitutional ratification debate of 1787-88. Each of these is considered in turn as it relates to the concept of "protected self-government." (DB)

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A Blueprint for Self-Government

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**The Bill of Rights as
A Blueprint for Self-Government***

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The twentieth-century conception of constitutional law views the Bill of Rights as a national charter of individual rights. Typically, these rights are analyzed under the categories of "freedoms of expression" and "rights of the accused." Those amendments which do not fall under one of these two categories are made to serve a modern purpose (as is the case for the Second and Ninth Amendments) or dismissed as irrelevant for modern purposes (as is the case for the Third and Tenth Amendments).

My concern with this paradigm is not that it establishes bad law. Jurists reasonably disagree over the relevance of the intent of the framers for current constitutional law, and I happily leave this subject for others to debate. Rather, my concern is that this twentieth-century paradigm is often applied retrospectively as *historical* interpretation.¹

The purpose of this essay is to examine the eighteenth-century meaning of the Bill of Rights and the particular rights provided within it. This is a task of cultural anthropology as much as legal history since we must recover how the eighteenth-century mind conceptualized rights before one can understand the structure and meaning of the Bill of

*Revised version of a paper delivered at the Teacher Institute sponsored by the Law, Youth and Citizenship Program of the New York State Bar Association on "Enhancing Constitutional Studies in Order to Form a More Perfect Union: The Bill of Rights--Securing the Blessings of Liberty," Lancaster, PA, July 29, 1991.

¹My interpretation of the late eighteenth-century meaning of the Bill of Rights was developed independent of, but is indebted to, the writings of Donald S. Lutz and Ahkil Reed Amar. See especially, Lutz, *The Origins of the American Constitution* (Baton Rouge, La.: Louisiana State University Press, 1988) and Amar, "The Bill of Rights as a Constitution," *Yale Law Journal* 100 (March 1991): 1111 - 1190.

Rights and its provisions.

The Eighteenth-Century Conception of the Bill of Rights

The Bill of Rights is a product of an eighteenth-century conception of rights and their place in the constitutional order. Let me begin by enumerating the features of the eighteenth-century paradigm of the Bill of Rights and then briefly suggest the consequences of its contemporary misinterpretation.

1. The Bill of Rights was written not as a freestanding charter but as a list of constitutional amendments intended to alter, as well as add to, existing constitutional provisions concerning the relations between the people and each of the branches of the new national government.

2. The Bill of Rights was written as a set of limits on the new national government and not on government in general.

3. The limits on national government set out in the Bill of Rights are institutional as well as individual in nature.

4. The rights set out in the Bill of Rights are evenly divided between collective rights associated with reference to "the people" and individual rights associated with "persons."

Notwithstanding the important differences between Federalists and Antifederalists, a point to which I shall later return, there is a basic similarity between these two eighteenth-century views which stands in sharp contrast to today's conception of rights. Neither Federalists nor Antifederalists could foresee the individualistic tendencies built into the constitutional framework of their own design. The eighteenth-century conception of rights was more community-oriented or *majoritarian* than the individual-oriented or *individualistic*

conception of rights today. The eighteenth century viewed the individual more as a person made complete by the community than as a freestanding actor dichotomized from society.

Looking back, the twentieth-century observer sees the Bill of Rights as a simple enumeration of rights belonging to the individual *qua* individual. However, in the eighteenth century, the Bill of Rights was conceptualized as a far more complex matter of rights operating at different levels and in relationship to different institutions. Within this conceptualization, the Ninth and Tenth Amendments, as we shall see, were culminating provisions, not inoperable exceptions, of popular sovereignty and federalism.

A useful term to describe the eighteenth-century conceptualization of the Bill of Rights is "*protected self-government*." This concept contains two strands: civil liberties and the right to self-government. The Bill of Rights contains a wide range of provisions (twenty-eight by my count) which were designed not only to guarantee civil liberties but also to tie those liberties into the political right of self-government. Today, we have come to interpret and value each of the rights in the Bill of Rights on their own terms. However, two hundred years ago, the founders (Federalists and Antifederalists alike) interpreted and valued those rights in terms of their capacity to protect and be protected by the political right of self-government. Some of these rights were connected to the larger right of self-government by the American colonial and early state experiences, while others arose out of distant remembrances of the excesses practiced in England by the Star Chamber and other institutions of government.

The two strands of civil liberty and self-government operated at two levels. At the individual level, the provisions in the Bill of Rights were intended to protect individual and

minority rights of self-government (as in autonomous individual choice and movement) from the abuses of national government. This level is most easily detected by its reference in the Bill of Rights to the "accused" or the "person." At a second level are those provisions intended to protect the majority rights of self-government of civil society (whether that be local, state, or national) by the people in their relationship with the national government. This level is most readily apparent in references to "the people." Leonard W. Levy speaks to the continuing relevance of these two levels:

Clearly the Bill of Rights is crucial to the civil liberties of all Americans, both as individuals and as members of minority groups. (We are all members of some minority.) More significant, and not so readily apparent, is the importance of civil liberties to our society as a whole, as part of the machinery of self-government. That is, the Bill of Rights not only imposes the ground rules by which the majority governs but also makes self-government possible.²

The twentieth-century mind posits an inverse or zero-sum relationship between these two levels of individual and minority rights on the one hand and majority rights on the other.³ James Madison anticipated this republican danger in *The Federalist No. 10*; however, eighteenth-century political thought generally and Antifederalist thought in

²Leonard W. Levy, "Why We Have a Bill of Rights," *Constitution* 8, no. 1 (Winter 1991): 8.

³*Cf.* Isaiah Berlin, "Two Concepts of Liberty," an inaugural address delivered before the University of Oxford on 31 October, 1958 (Oxford:Clarendon Press, 1958). Both federalists and Antifederalist theories represented "negative" and "positive" liberty in Berlin's terms.

particular presumed a positive relationship among individual, minority, and majority rights. The community was viewed as a mediating institution between the individual and the new national government, while today institutions of the national government, such as the courts, are often viewed as mediating institutions between the individual and the community.

The Example of Trial by Jury

The right to a trial by jury is viewed today simply as one of those "rights of the accused" which belong to the individual in society. In the late eighteenth century, Federalists and Antifederalists alike viewed the right of trial by jury as a right belonging not only to the accused but also to the citizen as juror. In the latter sense, the right of trial by jury was the self-government right of a juror to make judicial decisions in the jury box in much the same way as the right to vote was a right of the elector to vote in the legislative process, albeit by representation in the ballot box. It also provided two checks by the people against the excesses of government: the grand jury was a check against public corruption; the petit or trial jury was a check against judges.

Today, one might find this dualistic view of juries difficult to comprehend. However, this view does explain why this right is located in three different amendments: The individual jury right of the accused is found in the Sixth Amendment provisions for "a speedy and public trial by an impartial jury"; and the collective rights of the people are found in the Fifth Amendment provision for "a presentment or indictment of a Grand Jury" and the Seventh Amendment provisions preserving the right of trial by jury "In Suits at common law where the value in controversy shall exceed twenty dollars" and restricting federal courts

from re-examining factual decisions made by juries.⁴

These jury provisions are neither random nor unrelated. In fact, if we were willing to accept the Bill of Rights as an arrangement of institutions as well as rights, we would be able to re-conceptualize these provisions as setting out the jury as an institutional subset of Article III of the United States Constitution. In fact, that is precisely what these provisions accomplish, especially when supplemented by the jury provisions of the Judiciary Act of 1789 passed by Congress within days of its passage of the proposed Bill of Rights. In this way, the jury provisions in the Bill of Rights and the Judiciary Act begin to make sense. Together, they set out the organization, jurisdiction, and rights of grand juries and petit juries as *mediating institutions* between the individual and the people, on one hand, and various institutions of the new national government (corrupt officials, prosecutors, and judges) on the other hand. Put in its simplest terms, then, these jury provisions amount to a blueprint for self-government in the judiciary.

The entire Bill of Rights can be analyzed in precisely this way. In other words, of the twenty-eight provisions contained in the Bill of Rights, most provide not only for individual and collective rights but also for those mediating institutions (e.g., church, media, militia, and state) widely accepted as enabling individuals and the people as a whole to access and check government. In this sense, the Bill of Rights becomes a study not only of rights protection but also of "institutional design," a term used to suggest the search for patterns, not plans, in the Bill of Rights.

⁴This paragraph draws on Ahkil Reed Amar's discussion in "The Bill of Rights as a Constitution," which contains a richly detailed treatment (pp. 1162-1179) of the jury in eighteenth-century constitutional thought.

What are the sources of the Bill of Rights and what is its structure or institutional design? It is toward these questions that the remainder of this essay is addressed.

Sources of the Bill of Rights

Colonial Americans demanded "the rights of Englishmen." However, this colonial demand for English rights should not be confused with the rights that actually wound up in the Bill of Rights. In point of fact, the Bill of Rights went well beyond the rights of Englishmen and lagged well behind the intervening demands of Antifederalists. Let us attempt to disentangle these various objects of confusion concerning the origins of the Bill of Rights.

There are five basic sources of the concept of "protected self-government" and its particular provisions contained in the United States Bill of Rights. These are English law, Puritan and Whig consent theory, American colonial charters of liberties, first American state constitutional bills of rights, and the constitutional ratification debate of 1787-88. Let us consider each of these in turn as they relate to the concept of "protected self-government."

A. English Law

Four great laws, collectively referred to the English "charters of rights," are often credited as the earliest origins of the Bill of Rights. These are the Magna Carta of 1215, the Petition of Right of 1628, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689. None of these great charters proclaim the *people's* right to self-government. Magna Carta extracts feudal privileges and protections from the king for his feudal barons and freemen, while the latter two charters were designed to protect certain individual liberties

and parliamentary safeguards within a system of representative government by Parliament. Interestingly, few of the rights contained in these documents found their way into the United States Bill of Rights. Of twenty-eight provisions in the United States Bill of Rights, approximately one-third existed in English law. These include: the freedom of petition (and implicitly of assembly); free speech (but only to members of parliament); the right to bear arms; freedom from unreasonable search and seizure, excessive bails and fines, and cruel and unusual punishment; the right to a jury trial by one's peers; and the protection of due process of law (actually, "the law of the land"). However, many of these rights had not been guaranteed until the English Bill of Rights of 1689, after comparable guarantees made their first formidable appearance on the American scene in the Massachusetts Body of Liberties of 1641.

Some of the criminal justice protections contained in the United States Bill of Rights were included with English oppressions in mind. Despite English prohibitions against cruel and unusual punishments, the English tolerance level for certain kinds of punishment was higher than that of Americans. Students of today will relish the following description of a typical English sentence for treason delivered as late as 1803:

That you, and each of you, (here his lordship named the prisoners severally,) be taken to the place from whence you came and from thence you are to be drawn on hurdles to the place of execution, where you are to be hanged by the neck, but not until you are dead; for while you are still living, your bodies are to be taken down, your bowels torn out, and burnt before

your faces; your heads are to be then cut off, and your bodies divided each into four quarters and your heads to be then at the King's disposal; and may the Almighty God have mercy on your souls.⁵

Still, eighteenth-century Americans claimed the rights of Englishmen and maintained allegiance to their English legal inheritance, even though, to quote Leonard W. Levy, they had "progressed far beyond the English in securing their rights."⁶ In objective terms, Magna Carta contained the germ of "self-government" protected by the rule of law even if those protected were a privileged few. At this level of abstraction, how can one resist Winston Churchill's famous description of Magna Carta as "a law which is above the King and which even he must not break. This reaffirmation of a supreme law and its expression in a general charter is a great work of Magna Carta"⁷ To a certain extent, American founders claimed their intellectual indebtedness to English law even while departing from it.

B. Consent Theory

Two theories constitute the intellectual wellspring of the Bill of Rights and the concept of protected self-government on which it is based: Puritan covenant theory and Whig compact theory. Both originated in the late sixteenth-century England and flourished in the New World. The political propositions of these two theories are closely related, and,

⁵As quoted by Akhil Reed Amar, "The Bill of Rights as a Constitution," p. 1162. *Trials for High Treason of Lieut. Col. Edward Marcus Despard et al.* (Birmingham, England, 1803) at 46.

⁶Leonard W. Levy, "Why We Have a Bill of Rights," p 11.

⁷As quoted by Bernard Schwartz, ed., *The Bill of Rights: A Documentary History*, 2 vols. (New York: Chelsea House in association with McGraw Hill, 1971), I, p 7.

to a certain extent, compact theory is a secular application of covenant theology.

Today, we connect covenant theory with the Mayflower Compact and the founding of the Pilgrim Colony, while compact theory is associated with the writings of John Locke and the Declaration of Independence. Two hundred years ago, the framers of the Bill of Rights would probably have relied more on the covenant-based Massachusetts Body of Liberties of 1641 and the compact-based Virginia Declaration of Rights of 1776. In any case, the distinguishing idea is this: "A compact is a promise proceeding from us, law is a command directed to us."⁸

Covenant and compact theories are, of course, decisively different in one important respect: The former is designed to create a religious association with a divine purpose witnessed by God, while the latter may be entirely secular in nature. Despite this important difference, both theories share certain basic political characteristics in common. Typically, both take the form of: (a) a written agreement, (b) voluntarily entered into, (c) between co-equal parties, (d) to establish a permanent association, (e) based on the consent of the parties involved, (f) who acquire certain rights and responsibilities as part of the agreement, and (g) who may enjoy certain inherent rights stated in the agreement. In the American system, these agreements have been used to help found churches, towns, voluntary associations, improvement companies, colonies, states, and the nation itself. Among their earliest uses was the colonial charter of liberties--the precursor of state constitutional bills of rights.

⁸Sir William Blackstone, *Commentaries on the Laws of England*, 4 vols. (London, Eng., 1765), I, p. 45.

C. Colonial Charters and Early State Bills of Rights

Americans first began the practice of guaranteeing rights by constitution-like bills of rights in 1639 when the Maryland General Assembly, empowered seven years earlier by the Charter of Maryland, enacted the Act for the Liberties of the People. The act, in characteristically American fashion, provided that provincial inhabitants were entitled not only to the rights of any English subject but also to a system of criminal and civil justice "according to the laws of this province." In this one brief statement, we find the practical origins of the American invention of a constitutional bill of rights.

At the heart of the matter is the New World necessity and American proclivity for selective borrowing and innovation. The early colonists, like successive generations of immigrants, brought with them cultural expectations of, and actual experiences with, politics and the law. On arrival and settlement, these transported expectations and experiences met new circumstances and were forced to adapt in order to survive. In this adaptation process, part of the original cultural baggage was retained while other parts had to be discarded. Over the years, new legal imports arrived from England and were selectively borrowed, modified, or rejected. At the same time, new circumstances required indigenous and innovative responses. The result is a truly unique phenomenon, constitutional bills of rights, which have their roots in English common law, Puritan theology, and compact theory, but which is a purely American amalgam.⁹

The first detailed expression of this new form was the Massachusetts Body of

⁹The most complete exposition of this political theory of adaptation is developed by Donald S. Lutz in *The Origins of American Constitutionalism*. Also see Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989).

Liberties of 1641. Drafted by committee, debated in the General Court (provincial assembly) and town meetings, and later approved by the General Court, this great charter was motivated by that enduring desire for protected self-government which reached back in time to Magna Carta and forward 150 years to the Bill of Rights of 1791. When the Massachusetts General Court began its deliberations in 1635, John Winthrop made this observation in his Journal:

The deputies having conceived great danger to our state, in regard that our magistrates, for want of positive laws, in many cases, might proceed according to their discretions, it was agreed that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which, being allowed by some of the ministers, and the general court, should be received for fundamental laws.¹⁰

The Body of Liberties contains ninety-eight articles, including one with twelve subparts and another with eleven subparts. Adopted in 1641, nearly fifty years before the English Bill of Rights, the Massachusetts Body of Liberties contained nine rights later found in the United States Bill of Rights: due process of law, just compensation for the taking of property, freedom of speech, freedom of petition, right to bail, right of counsel, trial by jury, freedom from double jeopardy, and freedom from cruel and inhumane punishment.

Over the next 150 years, Americans practiced their acquired skills of constitutional

¹⁰As quoted in Bernard Schwartz, ed., *The Bill of Rights: A Documentary History*, I, p. 85.

rights construction on various occasions. Provincial assemblies incorporated bills of rights and other rights provisions within their colonial charters, continental congresses passed declarations and resolutions confirming the inherent rights of men in general and of Americans in particular, political statesmen (notably, John Adams, Thomas Jefferson, and Thomas Paine) drafted model constitutions and bills of rights, and the newly independent states rushed to make constitutions (approximately half including a bill of rights) as if they were second nature. All were of equal importance to their citizenry, but none quite equaled the Virginia Declaration of Rights of 1776 as a template for the United States Bill of Rights.

Written virtually in its entirety by George Mason, the Virginia Declaration opened with an extensive three-part preamble based on the principles of natural right and compact theory: "1. That all men are by nature equally free and independent, and have certain inherent rights. . . . 2. That all power is vested in, and consequently derived from, the People. . . . 3. That Government is, or ought to be, instituted for the community benefit, protection, and security of the people. . . ."¹¹ This part of the Virginia Declaration ties it to the Declaration of Independence written weeks later by fellow Virginian Thomas Jefferson, while the subsequent thirteen sections of the Virginia Declaration become a model for other state constitutions and a bridge to the United States Bill of Rights.

The Virginia Declaration brings together approximately one-half of the rights provisions later contained in the United States Bill of Rights. These parallels include landmark provisions for freedom of the press and the free exercise of religion, provision for

¹¹Bernard Schwartz, ed., *The Bill of Rights: A Documentary History*, I, p. 234.

a well-regulated militia, and many of the criminal justice safeguards contained in the Fifth through Eighth Amendments to the United States Constitution. Subsequent state bills of rights would borrow from and build upon the Virginia Declaration. As a result, virtually all of the rights provisions in the United States Bill of Rights can be found in earlier state bills.

D. The Ratification Debate of 1787-88

At the Constitutional Convention of 1787, George Mason called for a separate bill of rights, but his proposal was soundly defeated. Various reasons for this action were offered by the delegates; however, the strongest justification appeared later during the ratification debate when Alexander Hamilton maintains: "the constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS."¹² This view of the Constitution as a bill of rights is presaged by James Madison in *The Federalist No. 10*. Normally read as a perplexing statement of the dangers of factions, this essay asserts that the Constitution's very power design is also its greatest safeguard of liberty (in our terms, of "protected self-government") against the greatest threat to it; namely, majority tyranny.¹³

In this sense, the underlying difference between Federalists and Antifederalists during the ratification debate was not the lack of a bill of rights in the proposed Constitution of 1787. It was deeper than that. It was a difference over the principal danger to rights. For Madison, the essential rights problem of republican society is the need to protect individual and minority rights from the excesses of the majority. For Antifederalists, the basic threat to rights is posed by a strong national government and its obstruction of individual and

¹²Alexander Hamilton, John Jay, and James Madison, *The Federalist*, edited by Jacob E. Cooke (Middletown, Conn.: Wesleyan University Press, 1961; 1982), No. 84, p. 581.

¹³*Ibid.*, pp. 56-65.

majority rights as expressed in state and local policies.

At the Pennsylvania ratifying convention, Antifederalists developed a list of proposed amendments to the Constitution but failed to obtain convention approval for it. Despite this failure, the idea of amendments caught hold. Antifederalists at the Massachusetts convention attempted unsuccessfully to secure passage of a list of constitutional amendments as a condition of ratification, but they were able to secure convention passage of a list of recommended amendments. This strategy was subsequently employed by Antifederalist delegates to the state ratifying conventions of Maryland (without success), South Carolina, New Hampshire, Virginia, New York, and North Carolina.

All in all, Antifederalists proposed nearly 300 amendments to the Constitution. Many were duplicates. The largest and most inclusive state list was New York's passed in July of 1788 with sixty-nine provisions. Then, later in 1788, a Virginia printer, Augustine Davis, printed all of the state lists in a pamphlet entitled, *The RATIFICATIONS of the New Federal Constitution, together with the AMENDMENTS, Proposed by the Several States*.¹⁴

The Davis pamphlet is of more than passing interest. On September 12, 1788, Edmund Randolph, a Virginia Federalist, wrote to James Madison: "I desired Davis to make a collection, of which the inclosed is a copy." Subsequently, on October 12, 1788, Madison sent to Thomas Jefferson a "little pamphlet" which would provide "a collective view of the alterations which have been proposed for the new Constitution." Neither correspondence mentions this pamphlet by title, but there is a copy of this Davis pamphlet

¹⁴This pamphlet is reprinted in Stephen L. Schechter and Richard B. Bernstein, ed., *Contexts of the Bill of Rights* (Albany, N.Y.: New York State Bicentennial Commission, 1990), pp. 112-46.

with Madison's signature and marginal notes.¹⁵

The importance of this pamphlet and its contents is twofold: First, it brings together a virtually complete list of Antifederalist demands in 1788 including a bill of rights; second, it was subsequently read by James Madison who drafted the proposed United States Bill of Rights in 1789. A statistical analysis of the proposed amendments in the Davis pamphlet reveals the following points:

1. Forty-three percent of the amendments were in the form of rights to be included in a bill of rights.

2. Nearly 32 percent of the amendments were provisions designed to limit the powers of Congress, distantly followed by 17 percent which would have amended Article III provisions on the judiciary.

3. With the exception of the just compensation clause of the Fifth Amendment, all of the rights provisions in the Bill of Rights are contained in the proposed Antifederalist amendments printed in the Davis pamphlet and read by Madison.

Adoption of the Bill of Rights

The First Federal Congress convened in New York City in March 1789. On April 30, President George Washington took the opportunity of his inaugural address to recommend that Congress consider amendments to the Constitution that would include protections of the "characteristic rights of freemen." Then, on June 8, 1789, Congressman James Madison of Virginia proposed a bill of rights in the United States House of Representatives and asked the House to go into a committee of the whole to consider

¹⁵*Ibid.*, p. 111.

amendments to the Constitution. On July 21, the House voted to send Madison's proposed amendments along with those from the state ratifying conventions to a select committee. On July 28, that committee reported a list of seventeen amendments (essentially Madison's list), and, after postponement and delay, the full house reconsidered the amendments on August 13.

On August 24, the House approved the seventeen proposed amendments and sent them on to the Senate where they were read on the following day. On September 2, the Senate began its consideration of the amendments. Shortly thereafter, the Senate tightened the language and consolidated the House's list into twelve amendments. Among the eliminated House amendments was the one that Madison considered the most "valuable." This was a provision which would have extended a portion of the bill of rights to the states by providing that: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."¹⁶ The Senate, then, adopted its version on September 9, 1789, and sent its amendments to the House of Representatives on the next day.

On September 21, 1789, a House-Senate conference committee was called to settle the differences. The committee reported to the House on September 23, and the following day the House accepted the committee's report and passed a resolution calling upon the president to send copies of the proposed amendments to the states for ratification consideration. On September 25, the Senate concurred with the House resolution, and on

¹⁶Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution*, 5 vols. (Chicago: The University of Chicago Press, 1987) V, p. 25.

October 2, 1789, President Washington sent the list of twelve proposed amendments to the states for their approval. Several state legislatures rejected the first two amendments which provided a ratio for the apportionment of the United States House of Representatives and required two successive Congresses to enact salary increases for its members. Apart from this action, there was little to distinguish state ratifications which began on November 20, 1789, with New Jersey's ratification, and concluded over two years later, when Virginia became the eleventh and requisite state to ratify the amendments on December 15, 1791.¹⁷

James Madison was fulfilling a congressional campaign pledge to Antifederalist voters in his congressional district when he initiated and led the congressional debate over a bill of rights in the summer of 1789. Yet he had also decided that constitutional amendments could do no harm and might even do some good. Writing to George Eve on January 2, 1789, Madison observed:

Circumstances are now changed: The Constitution is established . . . and amendments, if pursued with a proper moderation and in a proper mode, will be not only safe, but may serve the double purpose of satisfying the minds of well meaning opponents, and of providing additional guards in favour of liberty. Under this change of circumstances, it is my sincere opinion that the Constitution ought to be revised, and

¹⁷In 1789, only ten states were needed to adopt amendments consistent with Article V which required ratification by three-fourths of the states. However, when Vermont entered the Union and became the fourteenth state in 1791, the requisite number increased from ten to eleven. This chronology relies upon John P. Kaminski, "The Making of the Bill of Rights: 1787-1792," pp. 44-50.

that the first Congress meeting under it, ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights. . . .¹⁸

On June 8, Madison delivered a carefully reasoned speech in conjunction with his introduction of a series of proposed amendments to the Constitution. In his speech, Madison relayed the Antifederalist fear that the national government would encroach upon individual rights and mediating institutions without a bill of rights. At the same time, Madison reiterated his fear that the majority would encroach upon minority rights. On this occasion, Madison expressed the belief that a bill of rights, though regarded by some as a mere "paper barrier" against the community, could serve as a protection of minority rights.¹⁹

Madison looked to compact theory, as the source for a national bill of rights. At one point in his speech, Madison rejects the applicability of the English Bill of Rights to the current situation on two grounds: First, the English bill was a barrier against the Crown not the Parliament; second, the most important rights demanded by Antifederalists (such as free press, speech, and conscience) had not been included in the English bill. Madison draws upon compact theory at various points in his speech, but none more directly than in his first proposed amendment (dropped in committee) taken almost verbatim from the natural rights and compact language of the preamble of the Virginia Declaration of Rights. In fact, Madison seems to have drawn his bill of rights principally from the Virginia

¹⁸As quoted in John P. Kaminski, "The Making of the Bill of Rights: 1787-1792," p. 42.

¹⁹Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution*, V, pp. 25, 27.

Declaration of Rights, which he had helped to draft, even though he researched and cited other state bills of rights as well as the state ratifying convention amendments printed in the Davis pamphlet.²⁰

Federalists and Antifederalists alike opposed Madison's proposed bill of rights. Federalists denounced the very subject of a bill of rights as an unnecessary and dangerous distraction from the more important congressional tasks of organizing and equipping the new national government. Antifederalists in Congress and around the country argued vehemently against Madison's proposal. George Mason portrayed Madison's version as "Milk & Water Propositions" that would serve as a "tub to the Whale" (i.e., a diversion).²¹

Antifederalists opposed Madison's proposal because it contained only a bill of rights. Recall the breakdown of Antifederalist proposals: 43 percent for a bill of rights; 49 percent for direct limits on Congress and the judiciary. Madison had omitted the second and more damaging category of demands, thereby outmaneuvering the Antifederalists. However, there was little they could do because Madison had seized the momentum for a bill of rights which Antifederalists themselves had initiated.

Federalists and Antifederalists obtained significant alterations to Madison's draft. These included the deletion of Madison's wide-ranging provision for freedom of conscience, the elimination of his provision extending the bill of rights to the states, a rearrangement of the articles, and the decision to place the amendments altogether and at the end of the Constitution. Although the natural rights preamble was also deleted, Madison's

²⁰*Ibid.*, V, pp. 26, 25.

²¹As quoted in John P. Kaminski, "The Making of the Bill of Rights: 1787-1792," in *Contexts of the Bill of Rights*, p. 37.

pathbreaking use of the word "shall" was retained.²² As a result, the United States Bill of Rights of 1791 is a true compromise, partly Antifederalist and partly Federalist.

The Structure of the Bill of Rights

As passed by Congress, the Bill of Rights contained twelve amendments consisting of thirty particular provisions. The first two amendments (containing two provisions on congressional representation and compensation) were rejected by the states, leaving the familiar tally of ten amendments containing the less familiar total of twenty-eight individual rights provisions addressing over a dozen mediating institutions. Viewed as an arrangement of institutions and rights protecting self-government, the Bill of Rights can be organized into four basic parts. The first part interposes institutions and rights into the relationship between Congress and the people. The second part looks to the relationship between the law enforcement agencies of the federal executive branch and the people, while the third part focuses on the relationship between the federal judiciary and the people. The fourth part comes back full circle to the relationship between the national government as a whole and the people and the states.

Let us briefly examine each of these institutional relationships in turn. First, it needs to be clearly stated that these parts have been identified as pattern not plan. The identification of a structure to the Bill of Rights is not intended as proof that the document was planned that way.

²²Until this time, most constitutional and legislative provisions of rights were actually declarations of rights filled with moral statements of "shoulds" and "oughts." By contrast, the first ten amendments to the United States Constitution is a bill of rights relying upon the obligatory use of the word "shall." See *The Origins of the American Constitution*.

1. Legislative Safeguards. Including the two amendments that failed, the first three amendments are designed to protect the right to self-government in the legislative arena. Included in this part are four pairs of rights with each pair aimed at strengthening a mediating institution and the rights needed to access that institution. The two unsuccessful amendments strengthen constituencies as a mediating institution between representatives and represented. They were designed to strengthen constituencies by fixing the ratio between congressional representatives and their constituents and by enabling the electorate to punish representatives who voted pay raises for themselves.

The second pair is a characteristic compromise in which churches as mediating institutions are protected from national domination (an Antifederalist fear) and from community prejudice (a Federalist fear). The third pair protects the press as a mediating institution of political opposition, while the last pair protects those institutional safeguards of *political organization* and *petition* which were utilized time and time again during the American Revolution from committees of correspondence to state ratifying conventions.

2. Law Enforcement Safeguards. The next five amendments look to protect the citizenry from a professional armed force (an historic Antifederalist concern). The Second Amendment interposes the *militia* and the right to bear arms between the citizenry and a professional army, while the Third and Fourth Amendments rely upon *civilian authority* as a mediating device. The provisions in these three amendments also look to safeguard property as an individual right and an institutional safeguard, and this theme is advanced in the Fifth Amendment just compensation clause. Like the provisions regarding legislative safeguards, most of these provisions can operate at both individual and collective levels of

rights.

3. Judicial Safeguards. Fifteen provisions (one-half of the total) were constructed as judicial safeguards. Of this number, approximately one-half neatly fit into the conventional mold of individual rights of the accused. In all likelihood, the federal judiciary was perceived to require so many safeguards because its judges were appointed or conversely the citizenry had no elective role. Recollections of abuses by the notorious English star chamber also may have influenced the number of judicial safeguards. Included in this subcategory are the Fifth Amendment provisions on double jeopardy, self-incrimination, and due process, the Sixth Amendment provisions on accusation and witnesses, and the Eighth Amendment provisions on bail, fines, and punishment. The remaining provisions regarding judicial safeguards are more complex because they are designed to protect both institutional safeguards and individual rights. This subcategory includes four mediating institutions: *juries*, *grand juries*, *lawyers*, and the *community*. The role of the local community as a mediating institution can be seen in the provisions for local and public trials.

4. The People and the States. The Ninth and Tenth Amendments are typically viewed as worlds apart from those amendments that preceded them. The Ninth Amendment is understood as a residual category of rights not contained elsewhere in the document, while the Tenth Amendment is considered to be "institutional" in nature unlike the "rights-oriented" provisions in the other nine amendments. A more historically accurate view of these amendments in their original setting is this: the Ninth and Tenth Amendments completed the institutional design of the Bill of Rights as a whole. If, as we

have suggested, the first eight amendments addressed the three branches of national government, it would not be unreasonable to expect the last two amendments to address the national government as a whole in relation to two other actors in the federal system; namely the people and the states. The Ninth Amendment reasserts *popular sovereignty* as both a collective right and an institutional safeguard, while the Tenth Amendment reaffirms federalism as a collective right of the states as, quite literally, the ultimate mediating institution. In this sense, these two amendments comport well with the other amendments, complete the institutional design of more than a dozen mediating institutions, and provide a perfectly fitting conclusion to that document.

Conclusions

Eighteenth-century constitutional and political thought had constructed a complete and, by 1789, rather coherent conception of rights and responsibilities. Two lessons can be drawn from these findings for the study and teaching of the Bill of Rights. The first provides a bridge from the eighteenth to the nineteenth century; the other connects both centuries to the present.

The principal challenge facing the American legal system in the eighteenth century was the application of ideas and institutions to the making of constitutional polities and their constitutions. One lesson to be drawn from our study of the Bill of Rights is this: institutional design was not restricted to the original Constitution of 1787; it also figured prominently into the Bill of Rights in the concern for mediating institutions as well as individual and collective rights.

Three great developments occur in law and society in the nineteenth century and

they are facilitated by the constitutional framework and institutional design fashioned in the eighteenth century. First, as James Willard Hurst has so wonderfully portrayed, the constitutional order established in the eighteenth century paved the way for an outpouring of creative energy in the nineteenth century directed toward the accumulation of economic power and wealth through the institutional medium of corporations and contracts.²³ Second, the constitutional order of the eighteenth century enabled the creative energies of the nineteenth century to pursue the expansionist aims of western settlement through the institutional design of communities, territories, and states. Third, the eighteenth-century constitutional order fueled the creative energies of a new generation of reformers who utilized the blueprint of the Bill of Rights in the organization of abolition, suffrage, and labor union movements.

The unifying element in these nineteenth-century developments is not the Bill of Rights itself but rather the blueprint for self-government which can be identified in that document. If we apply the institutional and rights dimension of that blueprint to the development of the economy, the West, and citizenship in the nineteenth and early twentieth centuries, we may be in a better position to study and teach how eighteenth-century conceptions and constitutional provisions of rights and institutions were selectively applied and creatively adapted to new sets of needs and expectations. In this way, we may come to a better understanding of the continuities and discontinuities of American legal history without leapfrogging over the nineteenth century or getting completely lost in its traditional

²³James Willard Hurst, *Law and Conditions of Freedom in the Nineteenth-Century United States* (Madison, Wisc.: University of Wisconsin Press, 1956).

focal points on their own terms.

The second lesson has to do with the importance of the institutional dimension of rights and act of associating as the glue of civil society. The act of associating is perhaps the most basic right and obligation of self-government and, therefore, the most basic obligation of civic virtue. Unless people learn to associate with one another, that is, to join together and cooperate for the advancement of common objectives, democratic society will quickly degenerate into anarchy or tyranny. This was the eighteenth-century conception of institutional safeguards and rights which Alexis de Tocqueville witnessed in operation in the 1830s and described in *Democracy in America* for future generations to learn.

The principle of association is a legacy of compact and covenantal traditions. The very word "covenant" is from the French *convenir* meaning "to come together." One of the distinguishing features of American history and culture is the idea that individuals join together and associate with one another on the basis of voluntary consent, mutuality of interest, and the rule of law. The origins of this idea stretch back to biblical times, but the premise--that society must be associative to survive--has become uniquely American. During the seventeenth and eighteenth centuries, associations were applied to the political objectives of founding and securing commonwealths, communities, and finally a nation. This process culminated in the Bill of Rights and its protection of civic association (First Amendment), religious association (First Amendment), military association (Second Amendment), judicial association (Seventh Amendment), and political association (Tenth Amendment).

Twentieth-century Americans have not lost the instinct for association. In fact, the

American system has witnessed a profusion of associations in the twentieth-century from social movements (such as labor, civil rights, women's rights, fundamentalism, and the environment) to more narrowly focused neighborhood associations, heritage organizations, service clubs, and political action committees (PACs). At the same time, the developments of individualism and the electronic media pose the greatest challenge to associative life in American civil society. Americans must decide whether they want to remain a nation of joiners or become a nation of passive observers. If we allow the television to replace associations, or successive generations fail to learn their constitutional rights, civic obligations, and organizational skills of association, we will sacrifice the opportunity to extend the right of self-government provided by the Bill of Rights into the twenty-first century.